Supreme Court, U.S.
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No. ____

In The

SUPREME COURT OF THE

UNITED STATES

October Term, 1999

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RITA RENEE JONES,

Plaintiff-Petitioner,

v.

MARVIN T. RUNYON,

Defendant-Respondent.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Noemi A. Collie, Esq.
434 W. 12th Street
Dallas, Texas 75208
(214) 942-6812
(214) 942-6818 (fax)
clebo@swbell.net

COUNSEL FOR PLAINTIFF

3328

## QUESTIONS PRESENTED

### I.

**WHETHER AN OBJECTION MADE FOR THE FIRST TIME ON APPEAL FROM A JUDGE'S REFUSAL TO RECUSE HIMSELF PURSUANT TO 28 U.S.C. SEC. 455 CAN BE DEEMED UNTIMELY DUE TO IT NOT HAVING BEEN MADE PRIOR TO THE JUDGE'S RULING WHEN THE BIAS ON THE PART OF THE JUDGE DID NOT BECOME APPARENT UNTIL THE JUDGE WAS RENDERING HIS RULING FROM THE BENCH AND THERE WAS NO OTHER LEGAL BASIS TO RECUSE PRIOR TO THE BIAS BECOMING APPARENT?**

### II.

**WHETHER REFERRING TO A PARTY'S COUNSEL AS "DESPICABLE" AND "SCUM" IN OPEN COURT IS EVIDENCE OF A PREJUDICE OR BIAS ON THE PART OF THE JUDGE WHEN THAT CASE WAS BEING RETRIED AFTER THE JUDGE HAVING BEEN OVERTURNED ON APPEAL, WHEN THE ATTORNEY HAS ALLEGED THAT THE JUDGE HAS VIOLATED HER OWN CONSTITUTIONAL RIGHTS IN A PRIOR DISCIPLINARY HEARING UNRELATED TO THIS CASE, AND WHEN IT IS POSSIBLE THE JUDGE MAY HAVE BEEN INFORMED JUST PRIOR TO TRIAL THAT SHE HAD WON HER APPEAL OVER THE DISCIPLINARY ACTION?**

## LIST OF PARTIES

Rita Renee Jones - Plaintiff-Petitioner

Noemi A. Collie - Counsel for Plaintiff-Petitioner

Marvin T. Runyon, Postmaster General - Defendant-Respondent

Lori Dym - Counsel for Defendant-Respondent

## TABLE OF CONTENTS


| | Page(s) |
|---|---|
| Questions Presented | i |
| List of Parties | ii |
| Table of Contents | iii |
| Table of Authorities | v |
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Applicable Statutes | 2 |
| Statement of the Case | 2 |
| Course of Proceedings and Opinions Below | 2 |
| Statement of the Facts | 5 |
| Reasons for Granting the Writ | 13 |
| Standard of Review | 13 |
| Summary of the Argument | 14 |
| Argument | 16 |
| A. Jones is entitled to a Fair and Impartial Tribunal | 16 |
| B. There is Evidence Chief Judge Buchmeyer Abused His Discretion by Failing to Recuse Himself | 17 |
| C. Jones did not Waive Her Objection Over Judge Buchmeyer's Failure to Recuse Himself | 20 |
| D. Harmless Error Does Not Apply | 21 |
| E. The Remedy Sought | 21 |

Conclusion 22

Certificate of Service 22

Appendix A

Appendix B

Appendix C

## TABLE OF AUTHORITIES


| Case(s) | Page(s) |
|---|---|
| Anderson v. Sheppard, 1988.C06.1840.P.73 (http://www.versuslaw.com) | 21 |
| Connelly v. United States District Court, 191 F.2d 692, 697 (9th Cir. 1951) | 17 |
| Dailey v. Vought Aircraft Company, 141 F.3d 224 (5th Cir. 1998) | 3, 18 |
| In Re Murchinson, 349 U.S. 133, 136, 99 L.Ed. 942, 75 S.Ct. 623 (1955) | 16 |
| Joint Anti-fascist Refugee Committee v. McGrath, 341 U.S. 123, 172, 95 L.Ed. 817, 71 S.Ct. 624 (1951) | 17 |
| Knapp v. Kinsey, 232 F.2d 458, 465-67 (6th Cir.), cert. denied, 352 U.S. 892, 1 L.Ed.2d 86, 77 s.Ct. 131 (1956) | 16 |
| Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860-61 (1988) | 17 |
| Liteky v. U.S., 1994.SCT.1576.P.54 (http://www.versuslaw.com) | 21 |
| Marshall v. Jerrico, Inc., 446 U.S. 238, 64 L.Ed.2d 182, 100 S.Ct. 1610 (1980) | 16 |
| United States v. Jordan, 1995.C05.177.P.16 (http://www.versuslaw.com) | 17, 21 |

| Statute(s) | |
|---|---|
| 28 U.S.C. Sec. 1254(1) | 2 |
| 28 U.S.C. Sec. 2101(c) | 2 |
| 28 U.S.C. Sec. 455(a) & (b)(1) | 2, 17, 20 |

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TO THE UNITED STATES SUPREME COURT:

Rita Renee Jones (hereinafter "Jones") petitions for a *writ of certiorari* to review, reverse and remand the judgment of the United States Court of Appeals for the Fifth Circuit wherein her objection over Chief Judge Jerry Buchmeyer's failure to recuse himself from her trial due to a bias against her attorney, Noemi A. Collie, was denied as being untimely.

## OPINIONS BELOW

The unpublished opinion of the Court of Appeals was issued on March 17, 1999. See Appendix A. It affirmed the

judgment of the District Court issued on September 17, 1997, which after a non-jury trial had dismissed Jones' claims of retaliation and other discriminatory acts based on the Findings of Fact and Conclusions of Law announced in open court. See Appendix B. Jones' Petition for Rehearing was denied by the Court of Appeals on May 25, 1999. See Appendix C.

## JURISDICTION

The jurisdiction of this Court is invoked under its review authority under 28 U.S.C. Sec. 1254(1) and 2101(c). The date of the last judgment sought to be reviewed is May 25, 1999. Jurisdiction in the Northern District Court was based on 42 U.S.C. Sec. 2000 *et seq.*. Appellate jurisdiction to the Fifth Circuit Court of Appeals was based on 28 U.S.C. Sec. 1291.

## APPLICABLE STATUTES

The obligation to recuse is governed by 28 U.S.C. Sec. 455, which states in pertinent part:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party . . .

28 U.S.C. Sec. 455(a)-(b)(1).

## STATEMENT OF THE CASE

## COURSE OF PROCEEDINGS AND OPINIONS BELOW

Jones filed her Original Complaint on July 23, 1993. In that Complaint she alleged among other things that she was terminated from her position with the United States Post Office on August 9, 1991 in retaliation for her having filed a previous EEOC complaint. (R. 106). On July 16, 1996, the District Court Judge, Chief Judge Jerry Buchmeyer, granted summary judgment on all issues. (R. 418-423). Jones filed her Notice of Appeal on August 15, 1996. (R. 425-426). On May 21, 1997, the Court of Appeals for the Fifth Circuit issued mandate, vacated the summary judgment as regarded Jones' retaliation claim, and remanded it to the District Court for trial. (R. 426-430).

On August 4, 1997, the Court of Appeals for the Fifth Circuit Court of Appeals heard oral argument on an unrelated case wherein Jones' counsel, Noemi A. Collie, argued that Chief Judge Jerry Buchmeyer had knowingly violated her constitutional rights when he failed to follow the law and the local rules by refusing to set aside an order by Judge Joe Kendall which had disbarred her from practicing before the Northern District Court without any due process.[1]

On September 2, 1997, the instant case was called to trial before Chief Judge Jerry Buchmeyer. (Docket Sheet, pg. 10).

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[1] See *Dailey v. Vought Aircraft Company*, 141 F.3d 224 (5th Cir. 1998). The argument in this case went very well, and at least two justices expressed their agreement with Ms. Collie's (or her counsel's) argument that her due process rights had been violated.

On September 3, 1997, Chief Judge Jerry Buchmeyer issued an Order dismissing the case with prejudice against Jones. (R. 506). On October 17, 1997, Jones acting pro se at that time filed her Notice of Appeal. (R. 507-508). On October 29, 1997 Jones filed her Transcript order form. On March 2, 1998, the Court of Appeals sent a letter to the Court Reporter, Joe Belton, stating the 60 day discount period had expired on February 7, 1998; that the transcript had not yet been filed; and imposing a 20 percent forced discount if the transcript was not filed by March 9, 1998. (Docket Sheet, pg. 11). On April 30, 1998, a second letter was sent to the Court Reporter regarding his failure to file the transcript. (Docket Sheet, pg. 11). On May 11, 1998, the Court Reporter filed the transcript consisting of two volumes in the instant case. (Docket Sheet, pg. 11).

On or about August 27, 1998 Jones filed her Brief. The sole argument made on appeal was that she was deprived her right to a fair and impartial tribunal by Chief Judge Jerry Buchmeyer's failure to recuse himself pursuant to 28 U.S.C. Sec. 455(a) and (b)(1). On or about September 4, 1998, Respondent filed its Motion to Dismiss Jones' Appeal as "Frivolous and Entirely Without Merit" Under Fifth Circuit Rule 42.4. On or about September 23, 1998, Jones filed her response to Respondent's Motion to Dismiss. On or about December 8, 1998, Respondent was granted leave to file it's brief out of time. On or about December 21, 1998 Respondent

filed its Brief.

On March 17, 1999 the Court of Appeals for the Fifth Circuit in a two page unpublished decision affirmed Chief Judge Jerry Buchmeyer's dismissal of Jones' claims on the sole basis that Jones had waived her right to object to Chief Judge Buchmeyer's failure to recuse himself by failing to raise an objection prior to his rendering his ruling in her case. See Appendix A. The Fifth Circuit denied Respondent's Motion to Dismiss the Appeal as Frivolous. See Appendix A. On or about May 7, 1999, Jones filed her Petition for Rehearing. On May 25, 1999 the Court of Appeals for the Fifth Circuit denied the Petition for Rehearing. See Appendix C.

## STATEMENT OF THE FACTS

On or about June 4, 1991, Jones was involved in an automobile accident.[2] At the time of this injury Jones was working in distribution operations and was being supervised by a Mr. Winston Johnson (hereinafter "Johnson"). (T-I, pg. 15). Johnson claims he was informed of Jones' accident upon returning to work from being off on annual leave himself. (T-I, pg. 17).

[2] This was the third serious injury Jones had suffered in the last few years. Jones received no compensation for any of these injuries from anybody, and at all times while off work she received no benefits or pay. She was forced to rely on her mother for support of her and her two children whom she had previously been supporting. (T-II, pg. 12-18). Jones was not simply staying at home in order to receive benefits without working. She was truly injured. as a result of one of these injuries, Jones suffered severe head injuries which caused her to lose a lot of her memory of events prior to 1990. (T-II, pg. 42-43, 86).

On June 6, 1991, Jones called into work indicating she needed an extended leave of absence. (T-I, pg. 27). Johnson failed as per policy to fill out the form approving or disapproving Jones' absence when she called in on June 6, 1991. (T-I, pg. 20-21-22). Mr. Johnson testified at trial that he contacted Jones on June 10, 1991, and instructed her that she needed to call in at least once per pay period, to contact him, and to submit documentation to substantiate her inability to report for duty at least once per pay period. (T-I, pg. 17). Jones denies Johnson informed her to provide documentation once a pay period, but claims that he called to wish her well and told her to make sure to bring in documentation upon her return covering the entire period she was absent. (T-I, pg. 171-172, 183-185; T-II, pg. 30).

Jones called in once per pay period. (T-I, pg. 30).

Section 513.363 of the Postal Service's ELM states as follows:

"Employees who are on sick leave for extended periods are required to submit at appropriate intervals, but not more frequently than once per pay period, satisfactory evidence of continued incapacity for work unless some responsible supervisor has knowledge of the employee's continuing incapacity to work."

(T-I, pg. 33-34).

Johnson admitted during trial that he had no doubt Jones was injured, and that if he believed Jones he was not required to have Jones provide medical documentation once a pay period.

(T-I, pg. 34, 82). Johnson also admitted during trial and in his deposition that so long as a supervisor knows the employee is ill, they don't necessarily have to produce medical documentation every pay period as long as they bring documentation with them that covers the entire period with them when they return. (T-I, pg. 34-35).

Initially Johnson was carrying Jones' absence as sick leave without pay (SWOP) because she had used up her sick leave, and was aware Jones was not receiving any disability or pay while off work. (T-I, pg. 40). At some point in time Johnson began counting the absence as AWOL because of alleged lack of documentation. (T-I, pg. 41). Although Jones continued to call in, Johnson did not inform Jones that he was counting her AWOL because of lack of documentation. (T-I, pg. 41). Nobody ever told Jones that she was being counted AWOL or that she needed to bring in any documentation. (T-II, pg. 3). Jones, although calling in during Johnson's tour of duty which had been the same as hers, was unable to reach Johnson personally. (T-II, pg. 2, 7).

On or about July 15, 1991 Johnson issued an absence inquiry letter. (T-I, pg. 43). The absence inquiry letter was initially mis-mailed and later resent on July 31, 1991, after it was returned undeliverable. Jones did not receive this letter until about August 2 or 3, 1991. (T-II, pg. 7, 21).

Johnson later issued a Notice of Removal which was

approved on August 2, 1991. (T-I, pg. 52).

On or about August 8 or 9, 1991, Johnson received a copy of a work release from Jones' doctor stating she had been under his care and temporarily incapacitated from June 8, 1991 through August 8, 1991, and would be able to return to work at an undetermined time. (T-I, pg. 53). Jones sent this in as soon as she learned of Johnson's actions, and was not told by Johnson or anybody else that this would be insufficient. (T-II, pg. 9-10). Jones saw her doctor regularly during her injury period and if at any time she had been informed that she required documentation other then what she had provided she would have provided it. (T-II, pg. 12).

Johnson did not notify Jones that this documentation was not good enough. (T-I, pg. 53-54). Johnson denied he was having any drug problems at that time, but that he had had one in the past. (T-I, pg. 58). Johnson testified at trial that he began using cocaine in the latter part of 1989, and began having a problem with it in 1990 and went in to drug rehabilitation in mid-1990. (T-I, pg. 59-60). During the trial there was some testimony that the drug problem Johnson had was with crack cocaine. (T-II, pg. 101). Johnson denied missing time from work in 1991 as a result of his problem, but admitted to going back into rehab in 1993. (T-I, pg. 62).

Johnson admitted that in or around April, 1991, he had tried to have another employee, Mr. Abney, removed from the

employment of the postal service. (T-I, pg. 71). This matter was resolved through the grievance process at step two by agreement. Jones was asked to give a written statement on behalf of Mr. Abney's grievance filed over this matter. In that statement Jones accused Johnson of treating black employees better then he treated the white employees such as Mr. Abney. (T-II, pg. 23-25). Within a few days after giving this statement Johnson began to take the actions he took against Jones. (T-II, pg. 30-31).

When asked in an EEOC affidavit whether Johnson was aware prior to issuing Jones' Notice of Removal that she had filed a previous EEO complaint, Mr. Johnson answered "yes". (T-I, pg. 77-78). It is this response, which the Court of Appeals relied on the first time this case went on appeal as the basis for its finding that there was a fact issue as to retaliation. At the time of trial Johnson denied he was aware of any EEOC involvement on the part of Jones.

Mr. Abney testified in that in December, 1990 or early 1991, Johnson called a meeting with his employees where they were informed that he was in a drug rehabilitation program. (T-I, pg. 126). Mr. Abney, who is a former police officer, testified that after his return to work in 1991, he thought Johnson was still under the influence of cocaine as a result of his losing his temper and flying off the handle with the employees, and that he might have made a joke about this. (T-I, pg. 126-128).

Prior to Jones' termination she was not given any of the lesser penalties available nor given what is called a "last chance" letter under normal policy. (T-II, pg. 31-32).

In trying to determine whether a postal service witness had any reason to doubt Johnson at the time Johnson had informed him that Jones had failed to provide medical documentation in 1991 in response to his request, Jones' counsel asked the witness whether he was aware Johnson was a "crack addict." (T-II, pg. 120-121).

During the trial Chief Judge Jerry Buchmeyer requested Jones take the stand again during the Postal Service's case. (T-II, pg. 130). The Judge asked Jones' what she thought about her counsel calling Johnson a "crack he[a]d", and Jones

indicated she did not feel this was right. (T-II, pg. 131).[3]

After closing argument, Chief Judge Jerry Buchmeyer questioned the undersigned counsel on her reasons for raising the drug addiction issue even though he had allowed such testimony over the Respondent's objections. (T-II, pg. 146-151). During that questioning, the judge raised the issue that there was never any evidence presented that showed Johnson was using the drugs on anything other then a sporadic basis or that it was a heavy use. (T-II, pg. 146). The undersigned counsel would respond at this time that for someone to go through drug rehabilitation on at least two occasions within a couple of years of each other must have been using drugs on more then a sporadic or light social basis, otherwise, there

[3] The undersigned counsel admits perhaps her choice of words were not the best or most concise, however, she did not refer to Johnson as a crack head, but a crack addict. There had been prior testimony that the drug Johnson was addicted to was crack, not simply cocaine. And although the word "crack" may have a more vicious connotation then cocaine, the fact is counsel had the right to use the work, it having been introduced into evidence by one of the witnesses. The fact that Jones' counsel referred to Johnson as an addict is also not necessarily untrue since once you are addicted to a drug, you are always addicted although you may be a recovering addict. The undersigned may have been remiss, however, in failing to make it clear in her questioning that Johnson had recently been admittedly using serious drugs although arguably he may not have been at the time he was providing the information to the postal service witness being questioned. The only reason the undersigned ever brought the drug issue up in the first place was because Jones had informed her there were rumors at the time that he was still under the influence when her issues came up, as was somewhat substantiated by Mr. Abney's testimony. The undersigned counsel was not trying to do anything she could do to win a case as she was later accused of doing by the judge, since the truth is she had no real expectation at that time that the case could be won in a non-jury setting, she was merely doing her best to work with what she had to work with at her client's request.

would have been no need to seek out treatment. There was evidence that Johnson had had a problem within the year before Jones' problems and within a year or two after. There was also testimony by Mr. Abney that it was believed around the time of Jones' problems with Johnson that Johnson may have in fact still been under the influence. There was some connection in terms of time although not very strong. Chief Judge Buchmeyer ultimately openly reprimanded the undersigned counsel by accusing her of attacking Johnson without any basis for doing so. (T-II, pg. 149).

Chief Judge Buchmeyer, however, did not leave it at that, instead he continued obviously out of anger and made the following statement:

"When a lawyer does something like that, it's little wonder that lay people like Mr. Johnson would think that lawyers are just a bunch of scum, that they're going to try to do anything to try to win for their client, doesn't make a difference what they have to do."

(T-II, pg. 150).

Chief Judge Buchmeyer then went further and stated, "[a]nd for a lawyer to take nothing and try to blacken the name of the main witness on the other side is despicable." (T-II, pg. 150).

Being taken off guard by the judge's anger and words, the undersigned apologized to all parties per the judge's instructions. (T-II, pg. 151). Upon later reflection, the undersigned does not believe she did anything deserving of such language.

The undersigned counsel did not file the Notice of Appeal on this matter and had not committed to representing Jones on appeal, but when Jones was unable to get the Court Reporter to give her the transcript, the undersigned counsel became involved again.

## REASONS FOR GRANTING THE WRIT

The Fifth Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. More specifically, is an objection to a judge's failure to recuse himself made for the first time on appeal untimely due to a failure to object prior to the judge's ruling when there was no known legal or factual basis for recusal prior to the judge's rendering his ruling, and therefore, no opportunity for the objection to be made prior to the judge's ruling? There is clearly a question of whether Chief Judge Jerry Buchmeyer should have recused himself in this case. The Fifth Circuit's decision in this case regarding the timeliness of Jones' objection to Chief Judge Buchmeyer's failure to recuse himself has deprived Jones of her constitutional right to a fair and impartial tribunal in a case in which the Fifth Circuit had already determined she was entitled to a trial on. Justice and equity demand *writ of certiorari* be granted in this case.

## STANDARD OF REVIEW

The decision of the Court of Appeals is reviewed for abuse of discretion. That discretion is abused if the ruling is based on

an erroneous view of the law or on a clearly erroneous assessment of the evidence.

## SUMMARY OF THE ARGUMENT

Jones contends that she has a right to a fair and impartial tribunal and that fairness requires an absence of bias or hostility, as well as, the appearance of impartiality. Jones likewise contends that the facts of this case are such that a reasonable and objective person, knowing the facts, would harbor doubts concerning the district judge's impartiality. First, this case was being tried to Chief Judge Jerry Buchmeyer after his earlier decision to dismiss the case had been overturned and remanded on an earlier appeal. Second, the undersigned, Jones' counsel at the time of the trial, was in the middle of appealing an order by Chief Judge Jerry Buchmeyer in an unrelated case wherein she had complained of the intentional violation of her constitutional rights to due process by both Chief Judge Jerry Buchmeyer and Judge Joe Kendall. Third, oral argument had taken place before the Fifth Circuit Court of Appeals on the undersigned's appeal within the previous 30 days before trial in Jones's case. Fourth, Chief Judge Jerry Buchmeyer severely reprimanded the undersigned during Jones' trial for what he perceived as sloppy litigation tactics, and in he process unfairly implied that the undersigned was "despicable" and nothing more then "scum." These facts if they do not prove actual bias or prejudice, create a set of circumstances from which a reasonable and objective

person would harbor doubts regarding the district judge's impartiality. The Fifth Circuit's finding that the undersigned's appeal was not frivolous implies its conclusion that such facts could in fact create the appearance of impartiality.

Jones further contends that the Fifth Circuit was in error to find that she waived her right to object to Chief Judge Buchmeyer's failure to recuse himself prior to the ruling in the case. Such a finding is neither supported by the law nor the facts of this case. Jones could not legally support a motion to recuse simply by claiming that Chief Judge Buchmeyer had upheld in an appellate like hearing a decision of another judge to disbar her attorney in a prior and unrelated case without more to substantiate her claim of prejudice or bias. It was not until Chief Judge Buchmeyer said or did something in her case which revealed an opinion that derived from an extra-judicial source and which revealed such a high degree of favoritism or antagonism as to make fair judgment impossible that Jones had any grounds for objecting to his refusal to recuse himself. No such statements were made until after Jones' closing argument and a few seconds prior to the rendering of the ruling from the bench. As such, there was no reasonable opportunity to object between the time there was a basis to object and the rendering of the ruling by Chief Judge Jerry Buchmeyer. Without such reasonable opportunity to object prior to the ruling from the court, Jones can not be said to have waived her right to object.

If Jones was deprived of a fair, impartial, and unbiased arbiter, this Court should reverse and remand the case for trial before a different judge in a different district.

## ARGUMENT

### A. Jones is entitled to a Fair and Impartial Tribunal:

It is beyond dispute that a "fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *In Re Murchinson*, 349 U.S. 133, 136, 99 L.Ed.942, 75 S.Ct. 623 (1955). Bias or prejudice on the part of a judge may exhibit itself prior to the trial by acts or statements on his part. Or it may appear during the trial by reason of the actions of the judge in the conduct of the trial. *Knapp v. Kinsey*, 232 F.2d 458, 465-67 (6th Cir.), *cert. denied*, 352 U.S. 892, 1 L.Ed.2d 86, 77 s.Ct. 131 (1956). In *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 64 L.Ed.2d 182, 100 S.Ct. 1610 (1980), the Supreme Court recognized that the "requirement of neutrality in adjudicative proceedings" serves dual interests of equal importance, as "it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance

that the arbiter is not predisposed to find against him." *Id.* at 252 *quoting Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 172, 95 L.Ed. 817, 71 S.Ct. 624 (1951)(Frankfurter, J., concurring)). Not only must litigants actually receive a fair trial, they must also believe that they have been given a fair trial. *See Connelly v. United States District Court*, 191 F.2d 692, 697 (9th Cir. 1951)("It is not enough that the judge, despite his predetermination of essential facts, may put them aside and conduct a fair trial but that there also shall be such an atmosphere about the proceeding that the public will have the 'assurance' of fairness and impartiality.").

### B. There Is Evidence Chief Judge Jerry Buchmeyer Abused His Discretion by Failing to Recuse Himself:

A district judge abuses his discretion for failing to recuse himself pursuant to 28 U.S.C. Sec. 455(a), when the facts underlying the case create an appearance of impropriety. *United States v. Jordan*, 1995.C05.177.P.16 (http:/www.versuslaw.com). The standard in deciding whether there has been an abuse of discretion is whether a reasonable and objective person, knowing all the facts, would harbor doubts concerning the judge's impartiality. *Lilijeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860-61 (1988).

Jones contends that the facts of this case either show actual judicial bias or hostility within the meaning of 28 U.S.C. Sec. 455 (b)(1), or give the appearance of impartiality under 28

U.S.C. Sec. 455(a).

First, the district judge was being forced to try a case which he had already determined did not warrant a trial, but which had been overturned on appeal. Second, Jones' counsel, the undersigned, had appealed to this same district judge as chief judge of the district for relief from an unconstitutional order rendered by Judge Joe Kendall in an unrelated case and which disbarred her from the practice of law before the Northern District Courts. See *Dailey v. Vought Aircraft Company*, 141 F.3d 224 (5th Cir. 1998). This matter was on appeal at the time the instant suit went to trial, and was argued within 30 days of the actual trial in Jones' case.

Jones contends these facts in and of themselves would not normally be sufficient for her to base a motion to recuse on. There is no law which Jones is aware of which allows the filing of a motion to recuse merely because a judge may have previously ruled against a party or their attorney in a previous unrelated case.

Keeping these connections between Jones' counsel and Chief Judge Jerry Buchmeyer in the instant case, Chief Judge Jerry Buchmeyer's referral to Jones' counsel as "scum" and as "despicable" under the circumstances in which these comments were made call into question his impartiality when it comes

Jones' counsel.[4] For arguments sake the undersigned will concede that perhaps she did not use the best judgment in raising the issue of Johnson's drug use or that she failed to tie in neatly his past drug use[5] with the events at issue in this case to the satisfaction of the court, but she would argue the actions complained of did not warrant the severity of reaction from Judge Buchmeyer. As such, it is reasonable to assume that there was some other factor compelling the court's actions. It is clear the district court held the undersigned's actions against Jones, because he specifically said while reprimanding the undersigned that "you don't do your clients any good when you make a brutal attack on another witness, and do not even do a good job in laying the predicate for what you're trying to attack." (T-II, pg. 148).

Jones contends a reasonable and objective person could from these facts conclude that Judge Buchmeyer actually harbored bad feelings toward the undersigned arising out of his prior dealings with her, and that because of his anger toward her became easily angered over what in reality was nothing more

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[4] Since the filing of appeal in this case, Chief Judge Jerry Buchmeyer has recused himself sua sponte from other cases assigned to him in which the undersigned is the counsel of record. It is not known what the reasons for such recusal were as there were no explanations given, but to the extent it had anything to do with a bias against the undersigned, such actions lend support to Jones' claims that Chief Judge Buchmeyer was incapable of remaining impartial during her case.

[5] Although Jones has had no means of confirming this due to the status of the case she was informed by former co-workers that shortly after her trial Mr. Johnson went back into drug rehabilitation again.

then a failure to properly lay predicate for an argument. The use of the words "scum" and "despicable" were out of proportion for the alleged transgression by the undersigned, and as such are evidence of bias or hostility. From these facts a reasonable and objective person could harbor doubts as to Judge Buchmeyer's impartiality, and as such it was an abuse of discretion for Chief Judge Buchmeyer to have failed to recuse himself either prior to trial or at the very latest prior to his rendering his decision from the bench in accordance with 28 U.S.C. Sec. 455(a) or (b)(1). Such an abuse deprived Jones of a fair and impartial trial before a fair and impartial tribunal as is her constitutional right.

### C. Jones did not Waive Her Objection Over Judge Buchmeyer's Failure to Recuse Himself:

The Supreme Court has left open the possibility that prejudice against a party's counsel could serve as the basis for a claim of judicial bias or hostility when it stated:

> [J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extra-judicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. . . Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration -- even a stern and short-tempered judge's ordinary efforts at courtroom administration -- remain immune.

*Liteky v. U.S.*, 1994.SCT.1576.P.54 (http://www/versuslaw.com). In the instant case, not only are we dealing with an extra-judicial source, i.e., the undersigned's accusations against Judge Buchmeyer that he had intentionally and knowingly violated her constitutional rights to due process during a disbarment which was eventually reversed and vacated as being unconstitutional, but we also have a case of remarks being made by the presiding judge during trial which Jones contends reveals a high degree of antagonism, i.e., unfairly calling the undersigned "scum" and "despicable" can hardly be called anything other then unabashed antagonism related to that extra-judicial source.

**D. Harmless Error Does Not Apply:**

To the extent that after review of the record this Court determines that whether there was impartiality or not is irrelevant because there was no harm done, Jones would point out that at least one appellate court had held that the harmless error doctrine is inapplicable in cases such as this where judicial bias and/or hostility is found to have been exhibited at any stage of a judicial proceeding. *Anderson v. Sheppard*, 1988.C06.1840.P.73 (http://www.versuslaw.com).

**E. The Remedy Sought:**

Jones contends the appropriate remedy in this case would be the reversal and remand of her case for a new trial before a different judge. *See U.S. v. Jordan*, 1995.C05.177.P.28-29

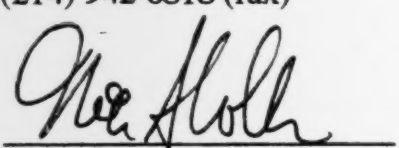
(http://www.versuslaw.com)(Upon finding an appearance of impropriety in the sentencing of a defendant the appellate court reassigned the case to another judge in another district for resentencing because "having one judge's colleagues in their district pass on their past actions well might, in and of itself, exacerbate the appearance of impropriety.").

## CONCLUSION

For these reasons, Jones would respectfully request this Court grant certiorari, and after appropriate briefing and hearing, reverse and remand this matter for a new trial before a different judge in a different district.

Respectfully submitted,

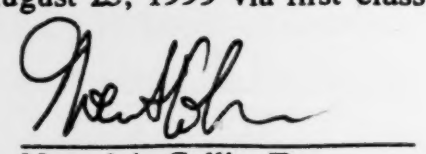
Noemi A. Collie, Esq.
434 W. 12th Street
Dallas, Texas 75208
(214) 942-6812
(214) 942-6818 (fax)



Noemi A. Collie, Esq.
Tx. Bar No. 04589100

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Writ of Certiorari has been served on Ms. Lori Dym, U.S. Postal Service, Law Department, 475 L'Enfant Plaza, S.W., Washington, D.C. 20260, on August 23, 1999 via first class mail.



Noemi A. Collie, Esq.

**APPENDIX - A**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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NO. 97-11164

Summary Calendar

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Rita Renee Jones,

Plaintiff-Appellant,

versus

Marvin T. Runyon,

Defendant-Appellee.

---

Appeal from the United States District Court
For the Northern District of Texas

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(3:93-CV-1511-R)

U.S. Court of Appeals
FILED
MAR 17 1999
CHARLES R. FULBRUGE, III
CLERK

Before HIGGINBOTHAM, JONES, and DENNIS, Circuit Judges.

PER CURIAM:[1]

Jones brings this appeal from Chief Judge Buchmeyer's dismissal of her discrimination claims. Jones alleges for the first time on appeal that Chief Judge Buchmeyer failed to recuse

[1] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

himself from her case due to a bias against her attorney, thus violating 28 U.S.C. Sec. 455.

Although a disqualification challenge raised for the first time on appeal is not per se untimely, the timeliness requirement of Sec. 455 obligates a party to raise the disqualification issue "at a reasonable time in the litigation." *Hollywood Fantasy Corp. v. Gabor*, 151 F.3d 203, 316 (5th Cir. 1998). This court has recognized that a party must make a Sec. 455 motion "at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a disqualification." *United States v. Sanford*, 157 F.3d 987, 988 (5th Cir. 1998), *petition for cert. filed*, Dec. 15, 1998 (No. 98-7290). We have rejected recusal challenges on appeal as untimely when the challenger waited to see if he liked an outcome before asserting the recusal issue. *See United States v. York*, 888 F.2d 1050, 1056 (5th Cir. 1989).

Despite her assertions that "the district judge harbored bad feelings toward plaintiff's counsel before the trial in this case," Jones contends that Chief Judge Buchmeyer's bias was not revealed until her attorney's closing argument. Jones failed, in any event, to raise her disqualification argument before Judge Buchmeyer announced his ruling in her case, notwithstanding her previously-held belief that the judge was biased aginst her attorney. Instead, she presents this argument for the first time on appeal. Thus, Jones failed to raise the recusal issue in a

timely manner and forfeited the objection.

AFFIRMED.

Appellee's motion to dismiss appeal as frivolous is hereby DENIED.

**APPENDIX - B**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

| | | |
|---|---|---|
| RITA RENEE JONES, | * | |
| | * | |
| | * | |
| VS. | * | 3:93-CV-1511-R |
| | * | |
| MARVIN T. RUNYON, Postmaster General, | * | |
| | * | |

**ORDER**

Based on the Findings of Fact and Conclusions of Law announced in open court, this case is DISMISSED with prejudice. Costs shall be taxed against the Plaintiff.

ENTERED: SEPTEMBER 17, 1997.

/S/ Jerry Buchmeyer
CHIEF JUDGE JERRY BUCHMEYER
UNITED STATES DISTRICT COURT

Entered on Docket
9/17 Pursuant
To F.R.C.P. Rules
58 and 79a

**APPENDIX - C**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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NO. 97-11164

Summary Calendar

---

Rita Renee Jones,

Plaintiff-Appellant,

versus

Marvin T. Runyon, Postmaster General, United States Postal Service (Sourthern Region)

Defendant-Appellee.

---

Appeal from the United States District Court
For the Northern District of Texas

---

**ON PETITION FOR REHEARING**

U.S. Court of Appeals
FILED
MAY 25 1999
CHARLES R. FULBRUGE, III
CLERK

Before HIGGINBOTHAM, JONES, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/S/ Pat Higginbotham
United States Circuit Judge